16298

No. ~~16,349~~

In the

United States Court of Appeals

For the Ninth Circuit

VIRGINIA J. KING, as Administratrix of the Estate of John Elvins King,
Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS, a corporation,
Appellee.

Supplemental Brief for Appellee

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Introduction

Appellee sought leave to file this Supplemental Brief for the reason that examination of Appellant's Opening Brief and Reply Brief revealed that Appellant's counsel had in effect saved their argument for their Reply Brief, citing therein numerous cases not mentioned in their Opening Brief and advancing at least two new theories not even hinted at in the Opening Brief. Under these circumstances, a Supplemental Brief on the part of Appellee became necessary if Appellee was not in effect to be denied its right effectively to respond to Appellant's contentions.

Application of a State Workmen's Compensation Act to the Death of An Airline Employee in An Airplane Crash Over the Ocean Is Not Unconstitutional as in Violation of the Jensen Doctrine.

At pages 1-3 of her Reply Brief, Appellant in effect argues that application of a State workmen's compensation act to the instant accident is invalid under the *Jensen* doctrine, (*Southern Pacific Co. v. Jensen,* 1917, 244 U.S. 205, 61 L. Ed. 1086). Appellant seems to argue both:

(1) that application of a State workmen's compensation act is unconstitutional, and

(2) that the Supreme Court cases at the time the Death on the High Seas Act was enacted indicate a Congressional intent to exclude State compensation acts.

As to point (1), we believe Appellant slurs over the very basis and rationale of the *Jensen* doctrine, namely, that it dealt with *maritime* law and *maritime* employments. As to point (2), we believe Appellant's brief makes serious errors of fact, and that the correct facts refute the point Appellant seeks to make.

(a) The Jensen Doctrine Is Not in Point.

We believe the *Jensen* doctrine is irrelevant and a false issue in this case for one simple but fundamental reason: that doctrine relates to the need for uniformity in certain basic aspects of *maritime* law, and peculiarly to the need for uniformity in regulating rights between employers and employees in certain classic *maritime* employments, whereas this case is an *airline* case, dealing with an industrial injury to an employee in a *non-maritime* industry who performed *no maritime* work. If this point be firmly kept in mind in the following discussion, we believe the total inapplicability of the *Jensen* doctrine will be evident.

Certain traditional maritime employments have always been regulated by Admiralty law. The clearest situation, the regulation of the mutual rights and duties of seamen and their employers, is the classic subject of Admiralty law. Another clear situation is the employment of stevedores or longshoremen performing the work of loading or unloading ships, once done (and in some primitive ports still done) by seamen themselves.[1]

In the original *Jensen* case the Supreme Court held, 5 to 4, that the New York State Workmen's Compensation Act could not validly be applied to the death of a stevedore killed while unloading a ship. The majority opinion held that "the general maritime law" was part of our national law (244 U.S. at 215) and that State legislation was invalid if it "works material prejudice to the characteristic features of the general maritime law" (244 U.S. at 216). The Court conceded:

> "* * * it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. *That this may be done to some extent cannot be denied.*" (244 U.S. 216, emphasis added.)

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1. The close relationship between the occupations of seamen and longshoremen is well described in *International Stevedoring Co. v. Haverty,* 1926, 372 U.S. 50, 71 L.Ed. 157, (decided before the enactment of the Federal Longshoremen's and Harbor Workers' Act) wherein Justice Holmes, in holding that longshoremen were "seamen" within the meaning of the Jones Act, said:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible. The work upon which the plaintiff was engaged was a *maritime service formerly rendered by the ship's crew.* [Citation] We cannot believe that Congress willingly would have allowed the protection to men *engaged upon the same maritime duties* to vary with the accident of their being employed by a stevedore rather than by the ship . . . In this statute 'seamen' is to be taken to include stevedores *employed in maritime work on navigable waters,* as the plaintiff was, whatever it might mean in laws of a different kind." (372 U.S. at page 52, emphasis added.)

but held that on the facts of the case before it, the employment was so maritime that the State compensation act was invalid, stating:

> "The work of a stevedore, in which the deceased was engaging, is *maritime* in its nature; his employment was a *maritime* contract; the injuries which he received were likewise *maritime;* and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction." (244 U.S. 217, emphasis added.)

Thus, in the *Jensen* case, and the two subsequent cases cited by Appellant's counsel, wherein the Supreme Court under the leadership of Justice McReynolds held certain occupational pursuits subject to exclusive control by Admiralty, the opinion of the Court emphasized the "maritime" nature of the employment and its connection with the classic maritime pursuits.

In *Knickerbocker Ice Co. v. Stewart,* 1920, 253 U.S. 149, 64 L.Ed. 834 (another 5 to 4 case), the Court stated the decedent's death occurred "while employed by Knickerbocker Ice Co. as bargeman and *doing business of a maritime nature*" (253 U.S. at 155, emphasis added) and held the particular act there in question invalid because seeking to sanction State compensation remedies "for injuries suffered by employees *engaged in maritime work*" (253 U.S. at 163-164, emphasis added).

In *Washington v. Dawson & Co.,* 1924, 264 U.S. 219, 68 L.Ed. 646, two cases were dealt with jointly; one presented the question "whether one engaged in the business of *stevedoring,* whose employees work *only on board ships in the navigable waters* of Puget Sound, can be compelled to contribute to the accident fund provided for by the Workmen's Compensation Act of Washington", while the other dealt with jurisdiction over "the death of a workman killed *while*

actually engaged at maritime work, under maritime contract, upon a vessel moored at her dock in San Francisco Bay and discharging her cargo" (264 U.S., pages 221-222, emphasis added.)

That the basis of the *Jensen* doctrine is the presence of an employment so *essentially maritime* that it should be regulated only by the Federal Government is made clear by examining the cases cited at pages 20-23 of our original Brief. These cases are, of course, all consistent with *Jensen* (as indeed is to be expected since they are unanimous opinions, written by Justice McReynolds, the author of the *Jensen* doctrine). Thus in *Grant Smith-Porter Ship Co. v. Rohde,* the Court emphasized the non-maritime aspects of the employment in question in the following words:

> "The contract for constructing 'The Ahala' was *nonmaritime,* and although the incompleted structure upon which the accident occurred was lying in navigable waters, *neither Rohde's general employment, nor his activities at the time,* had any direct relation to navigation or commerce * * * *And as both parties had accepted and proceeded under the statute by making payments to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law.* Union Fish Co. vs. Erickson, 248 U.S. 308, 63 L.ed. 261, 39 Sup. Ct. Rep. 112. Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general *maritime* law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."
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> * * * * * * *
>
> "This conclusion accords with Southern P. Co. vs. Jensen * * * and Knickerbocker Ice Co. vs. Stewart

> * * *. In each of them *the employment or contract was maritime in nature* and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. *Here the parties contracted with reference to the state statute;"* * * * (257 U.S. at pages 473-474, emphasis added.)

See also *Millers' Indemnity Underwriters v. Braud,* 1926, 270 U.S. 59 at 64, 70 L.Ed. 470 at 472, and *Alaska Packers Assn. v. Marshall,* 1938, C.A. 9, 95 Fed. 2d 279.

Standard Dredging Co. v. Murphy, 1943, 319 U.S. 306, 87 L.Ed. 1416 and *Pennsylvania Ry. Co. v. O'Rourke,* 1953, 344 U.S. 334, 97 L.Ed. 367 (Appellant's Reply Brief, p. 3) do not aid Appellant. The *Standard Dredging* case dealt with the validity of a New York statute levying unemployment taxes as applied to maritime employers. The Court rejected the argument that admiralty jurisdiction was "exclusively Federal" and sustained the State tax. Not only did the case deal with a factual situation completely unlike ours, but the only references of the Court therein to the *Jensen* doctrine were to its present limited and qualified status, and were of an almost derogatory nature.

The *O'Rourke* case did not involve a State workmen's compensation act at all. In that case the Court held that on its particular facts the industrial accident there involved was governed by the *compensation* provisions of the Federal Longshoremen's Act and that that Act's *exclusive-remedy provision barred* prosecution of a tort style action under the Federal Employers Liability Act.

To sum up, therefore, the *Jensen* doctrine has to do with *maritime* law and *maritime* employments, whereas (to borrow the words of Judge Goodman in his opinion in the instant case) an airline crew is "employed in a *non-maritime*

industry and performed *no maritime work*" (Tr. 36, 168 Fed. Supp. at page 139).[2] There is, therefore, no possible conflict between the *Jensen* doctrine (whatever its present status) and the judgment of the Court below.

(b) The Correct Facts Negative Appellant's Contention as to Congressional Intent.

Our original Brief (at pages 26-35) demonstrated the intent of Congress in enacting the Death on the High Seas Act was merely to correct an anomaly of the common law and was not to supersede State remedies. Appellant's Reply Brief suggests the *Jensen, Knickerbocker* and *Dawson* cases argue to the contrary.

The Death on the High Seas Act became law on March 30, 1920, having passed the House of Representatives on March 17, 1920, and the U.S. Senate on March 22, 1920.

The *Jensen* case was decided on May 21, 1917. Less than five months later, on October 6, 1917, the 65th Congress passed an amendment (40 Stat. 895) to the Judiciary Act seeking to preserve "to claimants the rights and remedies under the workmen's compensation law of any State." While the validity of this Act had been challenged in the *Knicker-*

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2. It is perhaps relevant to note that even application of the Death on the High Seas Act to airplane accidents at all is, so to speak, the product of "necessity". It has never seriously been contended that Congress, in enacting that Act (on March 30, 1920) had in mind airplanes or airplane flights over the ocean. The courts, however, have strained to find that Act applicable in passenger cases due to the well-known difficulties in the way of finding any State wrongful death statute applicable, and the fact that no other Federal wrongful death statute could possibly be construed to apply. The clumsiness of applying the Act to airplane cases at all was no doubt the cause of Judge Denman's reservation, as late as the *Higa* case in 1955, as to whether the Act applied at all in airplane cases. See the *Higa* opinion, 230 F.2d at page 786; "Our disposition of this case makes unnecessary the determination whether the High Seas Act applies to airplanes *which are not in any way water navigating vessels.*" (Emphasis added.)

bocker case (cited at page 4 of this Brief, and involving the death of a "bargeman * * * doing work of a maritime nature * * *"), this challenge had as of that time been uniformly rejected. The New York State Industrial Commission had granted an award and the New York State Courts had unanimously affirmed, holding the Act of October 6, 1917, valid in *Stewart v. Knickerbocker Ice Co.,* January 15, 1919, 173 N.Y. Supp. 924, and *Stewart v. Knickerbocker Ice Co.,* New York Court of Appeals, April 29, 1919, 123 N.E. 382. Not one judge had doubted the validity of that Act by March, 1920, when the Death on the High Seas Act was enacted by Congress. It was only two months afterwards, on May 12, 1920, that the Supreme Court, by a five to four vote, held this Act invalid as applied to the particular maritime facts involved in the *Knickerbocker* case.

Appellant's statement (at page 3 of her Reply Brief) that the Death on the High Seas Act "was enacted * * * at a time when Congress had failed in an attempt to have [workmen's compensation laws] included within that field" is therefore completely erroneous.

Appellant Has Misconstrued the Language and Effect of the Higa and Trihey Cases.

At pages 3-7 of her Reply Brief, Appellant has quoted certain language from two decisions of this Court, *Higa v. Transocean Air Lines,* 230 Fed. 2d 780, and *Trihey v. Transocean Air Lines, Inc.,* 255 Fed. 2d 824, and has also quoted certain language from an opinion of Judge Goodman in the District Court in *Wilson v. Transocean Air Lines,* D.C. Cal., 1954, 121 Fed. Supp. 85, in a manner to suggest that said language was approved in the *Higa* case. These quotations and this suggestion indicate that Appellant misconceives either the issue in this case or the issue in those cases.

The present case poses an issue of *substantive law* (the effect of a State compensation act on the Federal Death on the High Seas Act in the case of the death of an airline employee killed in the course of his employment during an airline flight over water). This is an issue of *substantive* law and is not an issue as to the choice of a proper *forum* for the enforcement of a given substantive law.

The issue in the *Higa* case dealt only with the latter question, namely, in what forum must an action to enforce a claim founded upon the Federal Death on the High Seas Act be brought? There was no issue as to any other substantive law being applicable. The *Higa* case held that an action brought to enforce a claim under the Death on the High Seas Act must be brought on the admiralty side of the Federal Court and could not be brought on the law side of the Federal Court nor in a State court. It was in this connection that Judge Denman cited the opinion of Judge Goodman in *Wilson v. Transocean,* characterizing that opinion as "excellent" (230 Fed. 2d 780 *at page 784,* Footnote 3, *referring to p. 95 of the Wilson opinion* and *not* to the pages quoted by Appellant's counsel). The question of applicable substantive law was not involved in *Higa,* but Judge Denman, in a dictum (at page 782) did discuss the history of Section 7 of the Death on the High Seas Act and clearly expressed the opinion that State remedies were *not* superseded.

The *Trihey* case involved neither a question of substantive law nor of the proper forum in which to enforce a given substantive law, but merely a question of sufficiency of evidence. The Court did in passing use the language quoted in Appellant's Reply Brief (at page 4) but this language, read in context, merely refers to the holding in *Higa,* that a claim brought under the Death on the High Seas Act must be brought in the admiralty court.

The fact that Judge Denman in the *Higa* case did not agree with the views expressed by Judge Goodman in the *Wilson* case as to the effect of the Mann Amendment to Section 7 is shown by the fact that in his opinion in the instant case Judge Goodman himself after referring to his *Wilson* opinion, stated:

> "In a dictum in Higa vs. Transocean Air Lines, 230 Fed. 2d 780, 782-783 (1955), the Court of Appeals for this Circuit expressed a contrary view." (Tr. 36 and 166 Fed. Supp. at page 139.)

In view of this, Appellant's contention to the contrary (at page 5 of Appellant's Reply Brief) seems wholly inexplicable.

Of course, this whole question is a side issue because, as Judge Goodman points out in his *King* opinion, the effect of State wrongful death statutes and State workmen's compensation acts are wholly different, the pertinent considerations are wholly different, and an intent to supersede the one in no way indicates an intent to supersede the other.[3]

The Davis Case and the "Twilight Zone" Doctrine Are Not Pertinent in the Instant Case.

At pages 8 and 14 of her Reply Brief, Appellant refers to "the 'twilight zone' cases" and *Davis v. Department of Labor,* 1942, 317 U.S. 249, 87 L.Ed. 246, apparently for

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3. The case of *Echaverria v. Atlantic and Caribbean Steam Nav. Co.,* U.S.D.C., N.Y., 1935, 10 Fed. Supp. 677, (cited at pages 7 and 8 of Appellant's Reply Brief) (dealing with a claim for the death of a *passenger* who died while aboard a *steamship,* in which the Court held that "*the death statutes* of the several states" were superseded by the Federal Death on the High Seas Act and therefore "they can no longer be applied to American *ships* on the high seas.") is at most like the *Wilson* case and distinguishable on the grounds pointed out in Judge Goodman's opinion in the instant case.

the proposition that Appellant had a "right of election" as to either the Death on the High Seas Act or the State workmen's compensation act, whichever she chose to pursue.

We assume Appellant would concede that those cases are in point at best only by way of analogy. We believe, however, there is no analogy whatever between the instant situation and the situation giving rise to the "twilight zone" doctrine.

The latter doctrine dealt with the problem of deciding whether industrial injuries in certain quasi-maritime situations fell within the coverage of the *Federal Longshoremen's and Harbor Workers' Act,* on the one hand, or State Workmen's Compensation Acts, on the other. As the Court knows, by its express terms the Federal Longshoremen's and Harbor Workers' Act applies only where a State workmen's compensation remedy "may not validly be provided by State law" (33 U.S.C.A. Sec. 903). In theory, therefore, under the language of the Longshoremen's Act there cannot be concurrent or overlapping coverage. In view of the fact, however, that the various quasi-maritime employments shaded off in fine graduations between "essentially maritime" employments and employments whose non-maritime aspects overshadowed their maritime aspects, and that the jurisdictional boundary line of the Longshoremen's Act was in one sense a question of fact, with only the vague and shadowy test of the *Jensen* doctrine as a legal signpost, grave practical problems arose in "close cases", resulting in numerous appeals, over-nice distinctions, and delay and uncertainty for employees and employers. The situation was described by the Supreme Court in the *Davis* case as follows:

> "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly

protected by this Federal Act; but, employees such as decedent here occupy that *shadowy area within which, at some undefined and undefinable point,* state laws can validly provide compensation. *This Court has been unable to give any guiding, definite rule* to determine the extent of state power in advance of litigation, and has held that the margins of state authority must 'be determined in view of the surrounding circumstances as cases arise.' John Baizley Iron Works v. Span, 281 U.S. 222, 230, 74 L.Ed. 819, 821, 50 S. Ct. 306. *The determination of particular cases, of which there have been a great many, has become extremely difficult.*

* * * * * * *

"*The very closeness of the cases* cited above and others raising related points of interpretation *has caused much serious confusion.* It must be remembered that *under the Jensen hypothesis, basic conditions are factual:* Does the state law 'interfere with the proper harmony and uniformity of' maritime law? Yet employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litgation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere. See e.g. Ayers v. Parker (DC) 15 F. Supp. 447. *Such a result defeats the purpose of the federal act,* which seeks to give 'to these hard-working men, engaged in a somewhat hazardous employment, *the justice involved in the modern principle of compensation', and the state acts* such as the one before us which aims at *'sure and certain relief for workmen.'*

The horns of the jurisdictional dilemma press as sharply on employers as on employees. In the face of the cases referred to above, the most competent counsel may be unable to predict on which side of the line par-

ticular employment will fall. *The employer's contribution to a state insurance fund may therefore wholly fail to protect him against the liabilities for which it was specifically planned.*" (317 U.S. 249, 87 L.Ed. 248-250, emphasis added).

These considerations therefore led the Supreme Court to lay down the "twilight zone" doctrine; in effect, the Court indicated that in "close" *Longshoremen's Act* cases it would sustain the jurisdiction of whichever administrative compensation body—State or Federal—assumed jurisdiction.

Several things are to be noted concerning the *Davis* case and the twilight zone doctrine:

(1) First, in the *Davis* case itself, the Supreme Court *sustained* the jurisdiction of a *State* Compensation Act, citing the presumption of validity of State legislation and also the *Alaska Packers* case which first sustained the validity of extra-territorial coverage of State workmen's compensation acts (cited and discussed at page 10 et seq. of our original Brief).

(2) The quasi-maritime employments involved in the "twilight zone" shade off in fine gradations between "essentially maritime" and "not essentially maritime" classifications. The history of the case-by-case determination of the jurisdictional boundary of the Longshoremen's Act produced an unending series of "close cases" with appeal after appeal and the Supreme Court had "been unable to give any guiding, definite rule".

(3) The twilight zone cases all dealt with industrial injuries for which it was clear the employee *was* entitled to a *compensation type remedy,* the only question being whether the schedule of benefits under the State compensation act or the Federal compensation act was to be applied. The Supreme Court thought it intolerable in such a situ-

ation to permit appeals concerning jurisdictional boundary lines to defeat and frustrate "the justice involved in the modern principle of compensation" and "sure and certain relief for workmen".

The instant situation is completely unlike the situation in the "twilight zone" cases. Unlike the imperceptible shading off between quasi-maritime employments, there is here a basic, fundamental, strikingly obvious distinction *in kind* distinguishing airline employment from maritime or quasi-maritime employments. There has been no history of doubt and confusion among employers and employees as to which compensation law is applicable. There has been and is only *one* compensation law applicable—the State compensation law. There is *no* Federal compensation law at all. The Death on the High Seas Act was in no sense drawn by Congress for the purpose of regulating industrial injuries in this (or any other) line of employment, but was merely to remedy an anomalous omission of the general common law.

To hold that Appellant has a "right of election" between a workmen's compensation type remedy and a common law action for negligence, far from being required by the *Davis* doctrine, would instead go completely against the spirit of that case, which was to establish certainty for both employees and employers and to insure the "sure and certain relief for workmen" under "the modern principle of compensation"; it would destroy an essential element of the workmen's compensation system—the "exclusive remedy" provision.

Miscellaneous Other New Points in Appellant's Reply Brief Answered.

At page 9 of her Reply Brief, Appellant cites cases to the effect that the Death on the High Seas Act extends to *employees*. The cases cited all deal with *seamen*, and none of

them deal with airline employees. Actually, only one of the cases cited, *The Four Sisters,* 75 F. Supp. 399, really held that a claim might be made under the Death on the High Seas Act for the death of a seaman in the scope of his employment against an employer; the other cases did not involve claims against employers for deaths of employees injured in the scope of their employment.[4]

The Four Sisters, however, is in no way in point to the problem in the instant case. The decedent was a *seaman,* and no one even contended that any State compensation act, with

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4. Thus, *Becker v. Moore McCormack,* U.S. District Court, D. Mass., 91 Fed. Supp. 560, involving the deaths of two seamen killed in a collision betweein two vessels, were actions, not against the decedents' employer, but against the owner of the other vessel. The decedents were seamen on *The Corinthian,* which collided with *The Mormacfir,* operated by defendant Moore McCormack.

The Black Gull, 1936, C.C.A. 2, 82 Fed. 2d 758, affirmed a judgment for the death of a pilot killed by the negligenee of a ship about to take the pilot aboard. The Court held that if the suit could not properly be brought under the Jones Act, on the contention that the pilot was not an "employee" of the defendant (as the defendant apparently argued) nevertheless the judgment could be sustained under the Death on the High Seas Act ("We have assumed that a compulsory pilot is *not* an employee of the vessel * * * therefore any duty of protection owed to him * * * must rest on some other basis than employment" (page 761)).

Polland v. Seas Shipping Co. was a death action under the *Jones Act* brought on the law side of the District Court with a jury. On appeal, the defendant argued that drowning was not covered by the Jones Act; the court held it was.

Batkiewicz v. Seas Shipping Co., U.S.D.C., N.Y. 1943, 53 Fed. Supp. 802, 803, involved a claim for the death of a seaman employed by the defendant, who was torpedoed on one ship and was being transported back to this country "as a passenger" (page 802) on another of defendant's ships. Plaintiff's theory was that the decedent had become mentally unbalanced and that the defendant negligently failed to restrain him, with the result the decedent jumped overboard. Plaintiff's complaint originally pleaded only the Jones Act. Thereafter plaintiff's attorney sought to add a count under the Death on the High Seas Act, since he began to doubt whether his claim properly lay under the Jones Act (undoubtedly on the theory that, since the decedent was riding as a "passenger" it might be contended that he was not an "employee" at the time of his death). The Court merely held that the complaint could be amended to add such a count.

an "exclusive remedy" provision, applied. The case rather dealt with the question whether the *Jones Act* (which creates a negligence cause of action and does *not* have an exclusive remedy provision) excluded a remedy under the Death on the High Seas Act, which likewise affords a negligence cause of action.

Schellenger v. Zubick, U. S. District Court, Pa., 1959, 170 Fed. Supp. 92, held that a *seaman's* claim under the *Jones Act* was not barred by the execution of a "State workmen's compensation *agreement*". We have no quarrel with any such holding. The difference between the employments of seamen and airline employees is fully covered in pages 24-26 and 35-40 of our original Brief and at pages 2-8 of this Brief. Moreover, we are relying not upon an "agreement", but rather upon the workmen's compensation act of the State of California, as applied by its Industrial Accident Commission.

Occidental Insurance Co. v. I.A.C., 1944, 24 Cal. 2d 310, 149 P.2d 841, is in no way in point. The California Supreme Court in that case annulled an Industrial Accident Commission award in the case of a *seaman* injured in the course of his employment *on land,* holding that seamen are governed by admiralty law.[5] The basis of the Court's ruling is made clear from the following language (24 Cal. 2d at pages 315-316):

> "Seamen have long been the wards of admiralty and a subject of special care under the maritime law. They

5. The logic of the ruling that seamen injured on land while on ship's business are covered by seamen's law in our view supports our position in this case, rather than Appellant's. It is eminently sensible to say that a seaman ashore on ship's business is still a seaman, whose rights and obligations should be determined by seamen's laws; it likewise makes eminently good sense to hold that an airline crew, flying over an ocean, is still an airline crew, and that their rights and obligations should be governed by the laws normally applicable to airline crews.

> are definitely allied with maritime law and their treatment is a matter peculiarly within the rule of uniformity of the maritime law. For those reasons they may be said to be in a different category from harbor workers and longshoremen in respect to determining the extent that the maritime law is paramount. (See O'Donnell v. Great Lakes etc. Co., supra, p. 43.) Hence, the most recent decisions of the United States Supreme Court have determined that they are under the wing of maritime law even though the injury occurs while the seaman is on land."

The Betsy Ross, 145 Fed. 2d 688, dealt with the very same injury involved in the *Occidental* case and noted that the defendant's argument that the case was governed by exclusive jurisdiction of the Industrial Accident Commission had already been rejected in the *Occidental* case.

Appellant cites California Labor Code Section 3203 as making the California Workmen's Compensation Act "self-subordinating". Section 3203 provides that the California Act "shall not apply to the employers or employments which, according to law, are so engaged in interstate commerce *as not to be subject to the legislative power of the State,* nor to employees injured while they are so engaged, except insofar as such divisions are permitted to apply under the Constitution or laws of the United States." (Emphasis added.)

In our original Brief (at pages 15-18) we cited the cases clearly holding that airline industrial injuries, although in interstate commerce, *are* subject to the legislative power of the State, even when occurring outside the territorial bounds of the State. Labor Code Section 3203 makes clear that the California Act is intended to apply to *every* situation except where it is beyond "the legislative power of the State." This general proposition is made concrete in this

particular case where the Industrial Accident Commission held that the California Workmen's Compensation Act applied to the instant case (Tr. 22-25).

In this connection, we do not understand Appellant's remarks on page 14 concerning the Commission's award and res judicata. In our original Brief, we pointed out that the Industrial Accident Commission had determined the contested issue as to its jurisdiction and the applicability of the California Workmen's Compensation Act; that this determination of a litigated issue had become final; that it was therefore res judicata under the case of *Sherrer v. Sherrer,* 1948, 334 U.S. 343, 92 L.Ed. 1429; and that Appellant was therefore estopped to challenge the proposition that the California Workmen's Compensation Act applied to the accident in question. We of course did not argue (as perhaps Appellant thinks) that the Commission, in its determination of the matter before it, had held that claims under the Death on the High Seas Act were thereby barred. The Commission made no such holding for the obvious reason that no such issue was before it. That, and that alone, is the meaning of the language from the referee's "Report on Decision" (Tr. 30, quoted in Appellant's Reply Brief at page 14). (The judgment of the Commission is of course its "Finding and Award" (Exhibit B, Tr. 22-25) and not the referee's "Report on Decision".) The question as to the *effect* of the application of the California Workmen's Compensation Act to the instant accident of course had to be determined by the court in which this issue was raised, namely the trial court in the instant action.

Appellant apparently contends that the Commission's finding was not res judicata because said finding was made "over protests and objections of appellant" (Appellant's Reply Brief, page 14). This is the first time we have ever

heard it contended that a judgment was not res judicata merely because the judgment was entered over the loser's objection.

Conclusion

We believe the foregoing has answered the new contentions raised in Appellant's Reply Brief and has shown:

(1) That the *Jensen* doctrine is not here applicable;

(2) That Appellant has misconstrued the *Higa* and *Trihey* cases;

(3) That the "twilight zone" doctrine is not in point even by analogy; and

(4) That Appellant's other contentions are without merit.

We submit that Appellant has failed to show any legal or practical reason to reverse the trial court's judgment. That judgment was correct and should be affirmed.

Dated at San Francisco, California, on June 29, 1959.

Respectfully submitted,

Steinhart, Goldberg, Feigenbaum & Ladar
John J. Goldberg
Neil E. Falconer